



November 3, 2000

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2000-4312

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 140944.

The Texas Department of Insurance (the "department") received a written request for all records pertaining to CMW Financial Inc. ("CMW"), certain named individuals, and two specified case numbers. You state that some responsive information will be released to the requestor. You contend, however, that other responsive records are excepted from required public disclosure pursuant to sections 552.101 and 552.103 of the Government Code.

You first contend that certain information contained in complaints the department has received regarding CMW is protected from public disclosure pursuant to the common law right of privacy. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

We have reviewed the information at issue and agree that most of the information you have marked is protected by common law privacy. Open Records Decision No. 373 (1983)

(personal financial information generally confidential). In this particular instance, we believe that the privacy interests of the complainants, and the public interest in the submitted information, would best be served by redacting the complainants' names, social security numbers, street addresses, and telephone numbers. The remaining information in the complaint documents must be released.

You next contend that the documents contained in the two files maintained by the Enforcement Section of the department's Legal and Compliance Division are excepted from public disclosure pursuant to section 552.103 of the Government Code. A governmental body has the burden of providing relevant facts and documents to show that section 552.103 is applicable in a particular situation. Under section 552.103(a) and (c), the test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated at the time of the records request, and (2) the information at issue is related to that litigation. *See also University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

You inform us that the two enforcement files involving CMW are currently pending with the Enforcement Section, that the Enforcement Section intends to initiate an enforcement action under the Administrative Procedure Act in connection with the allegations in these files, and that additional facts are being gathered regarding the allegations that will be the basis of the enforcement action. Proceedings under the Administrative Procedure Act constitute litigation for purposes of section 552.103. Open Records Decision No. 588 (1991). Based on these representations, we conclude that the two files "relate" to reasonably anticipated litigation for purposes of section 552.103. After reviewing the information at issue, we further conclude that this litigation was reasonably anticipated on the date the department received the records request. The department therefore may withhold most of the information contained in the enforcement files pursuant to section 552.103.

We note, however, two of the documents at issue consists of correspondence between the department and CMW.¹ Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Consequently, the department must release the document we have marked to the requestor.

We also note that among the documents at issue are public court records. Copies of records that have been filed with a court are not excepted from required public disclosure when held by a governmental official who does not hold those copies as an agent of the court. *See*

¹You indicate that one of these documents was submitted to this office in support of the applicability of section 552.103. However, we believe this document is responsive to the current request.

Gov't Code § 552.002(a)(17); *cf.* Open Records Decision No. 513 (1988) (evidentiary information held by district attorney not judicial record merely because information submitted to grand jury); *Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (no privacy interest in information contained in public court records). Accordingly, to the extent that the two enforcement files contain public court records, those records must be released to the requestor.

In summary, the department must redact from the complaint records all information tending to identify the complainant. The two enforcement files may be withheld in their entirety pursuant to section 552.103 except for public court records and correspondence between the department and CMW.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

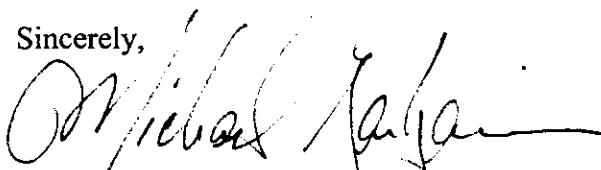
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino", written over a horizontal line.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/RWP/seg

Ref: ID# 140944

Encl. Submitted documents

cc: Ms. Katherine Woodruff
Beggs & Woodruff
140 E. Irving Boulevard
Irving, Texas 75060
(w/o enclosures)